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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RABINER & JONTOW, INC.,
a corporation now known as
ABBE RABINER, INC.,
Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Erwin Feldman, attorney on behalf of Rabiner & Jontow, Inc., now known as Abbe Rabiner, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix B, *infra*, pp. 2-12a).

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1967 (Appendix B, *infra*, p. 2a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals has properly exercised its authority as a reviewing court by affirming the Federal Trade Commission cease and desist order and has properly interpreted the opinions of this Court in *Moog Industries, Inc.*, 355 U. S. 411 and *Federal Trade Commission* v. *Universal-Rundle Corporation*, 387 U. S. 244.

STATUTES INVOLVED

The pertintent provisions of Section 2(b) and 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1527, 15 U. S. C. 13(d). (Appendix A, p. 1a)

STATEMENT

In 1961, the Federal Trade Commission began an investigation of alleged discrimination between competing customers in the granting of advertising and other promotional allowances by garment manufacturers. The investigation, although styled an industry investigation, was, in fact, an investigation into a series of different apparel manufacturing groups which manufactured both men's and women's apparel of various types. It was therefore a misnomer from the outset to call it a single industry investigation and as a result of this misnomer, various errors were committed both by the court below and the Commission in dealing with this question.

As a result of this investigation, the Commission issued an invitation to 310 manufacturers offering them an opportunity to sign consent agreements to cease and desist from granting discriminatory allowances. Of the entire number, representing various manufacturing groups 298 manufac-

turers signed such consent agreements. The petitioner herein, a manufacturer of women's coats and suits, retailing from $70. to $90. and several others, refused. The Commission, thereafter, issued a formal complaint alleging that the petitioner had violated Section 2(d) of the amended Clayton Act. 15 U. S. C. par. 13(d). (Appendix A, p. 1a)

Prior to the issuance of such complaint in this proceeding, the Commission held a public hearing on the 17th day of October, 1962, at which time statements were made by the Chairman of the Commission's enforcement program in connection with the violations of Section 2(d) of the Clayton Act, the Commission having found that:

> ". . . there are *widespread* violations of the law among suppliers of wearing apparel to department stores resulting from disproportionate advertising allowances. On the basis of this information the Commission could have issued complaints against a number of individual suppliers and, no doubt, obtained orders to cease and desist against them. This might have made our record look good to those who judge our accomplishments by the number of orders entered. However, it would have created competitive inequities and it would have been inconsistent with our policy of proceeding on an *industry-wide basis* where practicable. Additionally, the Commission had information to the effect that many suppliers desire to comply with the law in the granting of advertising allowances and that they would comply if they had some assurance that their competitors were likewise complying. (Emphasis supplied)
>
> "The Commission, thereupon, devised a procedure under which *all of the suppliers of wearing apparel* who the Commission had reason to believe were violating the law through the granting of dis-

> proportionate advertising allowances would be proceeded against simultaneously. Under this procedure formal complaints were sent to 149 suppliers, each of whom was extended the opportunity of disposing of the case through the executing of an agreement providing for the entry of a consent order. Many of the suppliers immediately availed themselves of this opportunity and returned the executed agreements. In the meantime, however, it came to the Commission's attention that a number of the more substantial members of the industry were not included in the original group, and the proceedings have now been suspended pending a determination as to what additional firms should be included." (Emphasis supplied) (R. pp. 118a and 119a.)[1]

All the evidence produced in the proceedings indicated that this was not a specific industry proceeding but dealt with a number of separate and distinct industry groups.

Two of the Commissioners, namely Messrs. Elman and Higgenbotham filed a strong dissenting statement to the views of the Chairman at this hearing. (R. pp. 120a-129a)

In their statement the dissenting Commissioners elaborated on the prior procedures of the Commission in selecting approximately 300 manufacturers against whom it had charged violation of Section 2(d) of the Robinson-Patman Act. Statements were made at this hearing that there were approximately 34,500 manufacturers of wearing apparel and apparel accessories in the United States and regarding this figure the dissenting Commissioners stated:

> "Even assuming that this estimate is exaggerated, if the 310 companies investigated by the Commission represent a fair sample, the number of

[1]References, unless otherwise indicated, are to the Joint Appendix.

manufacturers in the apparel industry who are granting illegal advertising allowances may run into thousands." (R. p. 121a.)

and gave a strong dissent to the procedure adopted by the Commission and stated as follows:

"While there is no disagreement as to these objectives, different opinions were expressed at the October 17 conference as to the most effective means for accomplishing them. On the one hand, some industry spokesmen urged the Commission to follow the traditional approach of issuing individual complaints and cease-and-desist orders. Even those representatives recognized, however, that this approach could not hope to succeed unless (a) the cease-and-desist orders were accepted voluntarily, through consent agreements signed by all or almost all manufacturers, and (b) such consent orders were issued and made effective simultaneously, and in a number running to many hundreds if not thousands. For example, the counsel for various trade associations comprising the dress manufacturing industry in metropolitan New York stated that the Commission:

'should aim for the broadest possible coverage, by simultaneously issued cases and desist orders directed at the *large segments* of the apparel manufacturing industries as is practicable. * * * (Emphasis supplied.)

Unless the apparel industries were covered as a whole, and on equal terms, the manufacturers who cannot grant discriminatory advertising concessions because of outstanding cease and

> desist orders would necessarily lose their businesses as long as other manufacturers continue willing and able to yield to the unreasonable and unlawful demands of volume buyers. As the Commission's experience teaches, the mere existence of the Statute is not sufficient to stop the illegal practice, and in the absence of cease and desist orders applicable to them competitors will continue to take advantage of this inequitable situation'."
> (R. pp. 122a and 123a.)

Other procedural attacks were made upon the Commission's program of singling out several manufacturers from literally thousands of firms and subjecting them to the cease and desist orders without taking any action against the remainder of the industries. (We urge the Court to read the full text of Commissioners Elman and Higginbotham objections to the procedures adopted by the Commission in instituting the apparel investigations. (R. pp. 120a-129a.)

Notwithstanding these attacks upon the Commission's procedure, the Commission, nevertheless, proceeded with its original plan and sent each of the several hundred firms which it had included in its enforcement drive a letter similar to the one sent to Rabiner & Jontow, Inc. (R. pp. 130a-132a.)

Rabiner & Jontow, Inc. refused to sign such a consent agreement and a formal complaint was issued in these proceedings and hearings held.

Following the hearing, an Initial Decision by the Hearing Examiner was made to which an appeal was taken before the Federal Trade Commission. During the course of the hearings, before the Hearing Examiner, the company acknowledged and stipulated that it had given certain allow-

ances to customers named in certain cities mentioned in the complaint without granting similar allowances to other retail stores in the same community. Nowhere in the Commission's case was reference made to the industry investigation upon which the complaint was based, nor was any evidence offered to contradict that at most 7[1] coat and suit firms were included in this investigation from hundreds of competing firms. No explanation was made as to how, by obtaining cease and desist orders against only 7 coat and suit firms would result in compliance with the Robinson-Patman Act, insofar as discriminatory advertising allowances were concerned in this industry and taking no action against literally hundreds of the remaining firms in the industry.

None of the facts introduced by Rabiner & Jontow, Inc. concerning the number of firms in the industry (which we will comment upon later) or the practices in the coat and suit industry with regard to the granting of advertising allowances throughout the industry and its impact on competition were rebutted. The Commission's position, in brief, was nothing more than presenting evidence of isolated instances of the granting of allowances on disproportionate terms in certain cities during certain years.

The decision of the Hearing Examiner proceeded as if there were no investigation and as if this were a simple individual case of 2(d) violation. The Hearing Examiner, in his Initial Decision, did comment upon the fact that Rabiner & Jontow, Inc. has established as a defense that:

> "Non-proportionalized cooperative advertising payments are rampant in, and an integral part of, the

[1]Statements had been made from time to time that the total number of women's coat and suit companies covered by consent orders was 7 or 8. The reason for this confusion is predicated on the fact that one of the companies had gone out of business and it is presently believed that the number of orders in the women's coat and suit industry under investigation, totals 7.

> modus operandi of the garment industry. *Complaint counsel did not contest this assertion.*" (Emphasis supplied) (R. p. 17a)

Indeed, in the Initial Decision, the Hearing Examiner stated affirmatively:

> "The Federal Trade Commission's investigation alluded to above (see RX24) found such to be the fact."

The "fact" referred to was the prevalence of *widespread* violations in all branches of the apparel industry, and the Hearing Examiner concluded:

> "The fact that the garment industry, as such, is engaged in making non-proportionalized cooperative advertising payments does not exculpate or excuse unlawful payments." (R. p. 17a)

and he cited various authorities. (R. p. 18a) None of these cases arose under industry investigations. The Initial Decision went on to theorize the circumstances under which the respondent, Rabiner & Jontow, Inc. could be exculpated and declared that such discriminatory payments could only be made under such circumstances. (R. p. 19a)

When this proceeding was brought before the Commission on petitioner's appeal from the Initial Decision of the Hearing Examiner, the Commission sustained the evidence of the Hearing Examiner. The Commission attempted to answer the petitioner's argument that the violations of 2(d) have been *widespread* in the apparel industry and the Commission made no attempt to correct these illegal practices to which the Commission responded by pointing out that in its decision in the matter of *Abby Kent Co., Inc. et al.*, Docket No. C-328 et al. (August 9, 1965) (CCH Trade

Regulation Reporter, Transfer Binder, Complaints and Orders, 1965-1967, Sec. 17310, dissenting opinion of Commissioner Elman, p. 22466) a proceeding which was part of this so-called industry-wide investigation and in which decision the Commission reviewed its action begun in 1961 of discriminatory advertising and promotional allowances given to the apparel industries, the Commission stated as follows:

> "The Commission thus having reason to believe that violations of section 2(d) existed throughout the industry made the determination, after considering and rejecting other proposed remedial approaches, that a general correction of these practices could best be accomplished by affording members of the industry an opportunity to sign consent agreements containing orders to cease and desist from granting discriminatory allowances. Subsequent thereto, the Commission during a period of approximately two years accepted agreements and orders from 298 apparel producers including *those significant sellers who were granting the largest amounts of allowances to the greatest number of buyers.* On August 9, 1965, all outstanding orders were made effective, *the Commission having determined at that time that this particular phase of the wearing apparel industry was for the most part terminated* and that 'The few unresolved matters *do not involve suppliers who constitute a force capable of competitively disadvantaging those industry members who will be under order.' Abby-Kent, supra.* The Commission further pointed out that its enforcement program in this industry would, when necessary, be supplemented by formal proceedings against selected buyers who knowingly induce or receive discriminatory allowances." (R. p. 77a) (Emphasis supplied).

We have never been informed on what basis the Commission decided to terminate the hearing or what evidence it had to support the contention that those who were proceeded against constituted a force which would provide satisfactory coverage.

It should be clear that the conclusion of the Commission had covered enough suppliers in the women's coat and suit industry to adequately deal with the question of compliance, a conclusion reached by the Commission and approved by the court of appeals decision that it may not challenge such question, as this is exclusively within the expertise of the Commission.

This, in effect, establishes the Commission as the sole authority for its conduct. Only the Commission can pass on the question of whether or not it has acted arbitrarily and this is how the court below applied the decisions in *Moog Industries,* supra, and *Universal-Rundle,* supra. This is obviously in contradiction to the statement which appears in *Moog Industries, Inc.*, supra, ". . . The Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry".

It should be noted further that even though the Commission in *Abby Kent,* supra, is dealing with all branches of apparel, the total number of orders obtained in the women's coat and suit industry remained constant at 7 and in the decision of the court of appeals, reference[1] is also

[1]The court of appeals, in its decision (Appendix B) states that the Commission earlier claimed that there was widespread violations in the apparel industry, apparently removed by the 298 consent orders. The court leaves the impression that the widespread nature of the violations among women's coat and suit manufacturers was also removed but it should be remembered that at all times the total number of orders in the women's coat and suit industry never exceeded 7, so the statement that the total number of consent orders obtained by the Commission since the institution of proceedings did not have any material effect upon the conditions prevailing in the women's coat and suit industry, as this figure never changed.

made to the Commission's statement as indicating the Commission's attempt to deal fairly with the problem, but it fails to recognize that at all times there were only 7 firms against whom orders were obtained and the references to 298 apparel orders or agreements can have no relevence in considering the women's coat and suit industry situation.

We challenge this finding and point out that it is contrary to the facts presented before the Hearing Officer and includes a number of assumptions not sustained by the evidence and refers to a broad wearing apparel inquiry when there were at least 20 different industries involved in this so-called wearing apparel industry investigation, none of whose divisions were related to each other.

Included among companies mentioned in *Abby-Kent,* supra, are at most 7 coat and suit manufacturers, of which this petitioner was included, out of a total of approximately 500 manufacturers. The total number of all the firms included in this so-called apparel investigation would exceed about 35,000 as found by the dissenting opinion at the beginning of this investigation.

A strong dissenting opinion in this case was filed by Commissioner Elman in the *Abby-Kent, supra,* ruling. He took up each of the contentions of the Commissioners and strongly refuted a number of conclusions. Commissioner

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Also, the statement in the court of appeals decision that the Commission was conducting its investigation and had, since the conclusion of the proceedings, obtained 6 orders against additional suppliers, in no way affects this conclusion as none of the suppliers, whose names are set forth in the opinion of the court, were in the women's coat and suit industry and thus again this statement has no bearing on the situation prevailing in the women's coat and suit industry. This is where the contention lies. For one purpose the court assumes that all apparel manufacturers are in one industry and uses the total figures for that one purpose without recognizing that they consist of a series of men's and women's product manufacturers, none of which compete with each other and that in the women's coat and suit industry to date there are only 7 effective consent orders even though the industry is composed of upwards of 500 manufacturers and it is conceded by the Commission that almost 200 are in competition with the petitioner.

Elman discussed the investigation from its beginning in 1962 and pointed out that he had taken a strong dissent to the early findings of the Commission enforcement procedures.

Commissioner Elman also dissented from the decision of the Commission in the instant case. (see R. pp. 84a-88a for text of dissenting opinion) Commissioner Elman pointed out that violations of Section 2(d) have been wide-spread in the apparel industry. He found that individual suppliers as the petitioner (Rabiner & Jontow, Inc.) have felt compelled to grant such allowances because of general competitive conditions in the industry. The wearing apparel industry, he noted:

> "... is highly fragmented, consisting of thousands of manufacturers, most of them very small in relation to the chain and department store buyers. For most manufacturers, the buyer is in the driver's seat; whatever he wants in the way of advertising or promotional allowances, the buyer is usually in a good position to get." (R. pp. 84a-85a)

He further pointed out that petitioner, Rabiner & Jontow, Inc., is:

> "... one of the two suppliers, out of the group of about 300 sued by the Commission, which refused to sign 2(d) consent orders. The suppliers which signed such orders represent only a fraction of the entire industry, and only eight of the outstanding orders are directed against members of respondent's particular segment of the industry—ladies' coats and suits." (R. p. 85a)

He further stated:

> "As respondent points out, more than 500 of its direct competitors are not under orders. It is

not hard to see why an enforcement policy designed to place even a substantial number of suppliers under order can accomplish little. The ability of large and powerful buyers to exact discriminatory allowances from suppliers not under order remains unimpaired. Even if the Commission could be sure of full compliance with the outstanding orders, this basic gap would not be plugged. Moreover, the impression persists that issuance of these orders has had little or no effect in eliminating discriminatory allowances in the industry." (R. p. 85a)

He concluded:

> "I think it is also inequitable to issue this order against respondent" (Rabiner & Jontow). (R. p. 86a)

and pointed out that the Commission's decision pertaining to the appropriate manner for applying the 2(b) defense:

> "... imposes an impossible and unrealistic burden on sellers." (R. p. 86a)

In the decision below (Appendix B, *supra,* p. 8a), the court of appeals points out that the statute gives relief to anyone who claims prejudice under the Commission's rules. *Inter alia,* the court points out that nothing prohibits a seller from meeting competition by permitting the seller to step out of his normal plan and meet the direct competition of a competitor under such circumstances. This is patently wrong for the reason that the Commission has ruled that only *lawful* competition can be met under the statute. In the case of the women's coat and suit industry, this would mean at most 7 companies who have filed lawful

plans. Any attempt to meet any other kind of competition would subject the seller to the dire consequences provided for in the Act.

This issue has become the subject of wide discussions involving suggestions for a reappraisal of the Act to eliminate this possibility.[1]

In the light of the various interpretations placed by the courts on Section 2(d) insofar as applies to singling out of competitors and the availability of meeting competition defense, the issue is now placed firmly before the Court for timely review and reconsideration.

REASONS FOR GRANTING THE WRIT

As we understand the decision of the Court of Appeals in this case, the court's ruling in *Moog Industries,* supra, and *Universal-Rundle,* supra, places in the hands of the Commission sole authority whether or not it had acted arbitrarily, and such a question was, therefore, not subject to review by the courts. It is our contention that this determination removes from the area of judicial review one of the most important and vexing problems facing the FTC in dealing with

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[1]See Washington Law Review, Vol. 42—October, 1966, *"The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal"* by Philip Elman. On p. 16, Article V, *Meeting Competition Defense* begins with the statement: "No issue has produced more serious collisions between antitrust policy and the Robinson-Patman Act than the determination of the scope and availability of the meeting competition defense. . . ." and points up the problems of invoking the defense of meeting competition and on pp. 18 and 19 states: "Moreover, a serious question has been raised as to whether there should be rigid and absolute insistence that the price met must be a lawful one. Commissioner MacIntyre has said that 'the right of self-defense long recognized is available only to counteract wrongful and unlawful conduct . . . This inconsistency between recognized right of self-defense and what has been provided in the way of self-defense under the "good faith proviso" is left unexplained by the (Supreme) Court and the Commission'."

these cases. Strong dissenting opinions in all these proceedings and the opinions of the Commissioners themselves, publicly and privately given, indicate how serious this problem has become.

The vexing nature of the problem is illustrated by the testimony given by the Chairman of the FTC in a recent hearing before a Subcommittee of the House of Representatives of the 89th Congress:

> "We have given a mandate to our enforcement bureaus. Instead of taking these cases as they come, one by one, the first thing they are to determine is whether or not this is an isolated situation that has come to our attention or whether it is something that is engaged in competitively by all the competitors. If so, to step back and, then with our resources, engage in what I would hope to be some basic planning and determine which would be the best tool and approach for us to take. . . ."
>
> "Historically, the Commission was wedded to the procedure of taking our customers or their cases as they come. The Commission had hoped . . . that with the tools that Congress had afforded the Commission to work with that even on the case by case method that proceedings against one, the others, if it affected them would take notice and follow suit. It just didn't work that way. . . . *It could be said in all fairness to these people that if there were 50 engaged in the same practice, what certainty would a party have that if they stopped, the other 49 would stop.* In our country, very rarely can a man be his brother's keeper. I think this is the basis of law. We are trying to enforce our law in the American way, equitably and fairly." (Emphasis supplied) (FTC Statement, Hearings before a Subcommittee of the Committee

of Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session, Part 3, pp. 404-405. See also: Hearings before Subcommittee of the Committee of Appropriations, United States Senate, 89th Congress 1st Session, pp. 828-30.)

The Commission's reasons for this enforcement program have been lucidly explained in several speeches by the Chairman of the Federal Trade Commission as well as other members of that Agency. Chairman Dixon, in a recent address, informed a group of American businessmen:

> "It must be recognized that some illegal practices are so widespread within an industry that to single out a few of the sinners would be *unfair. Simple justice would dictate* that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process." (Emphasis supplied)
>
> (Address by Paul Rand Dixon, Chairman of FTC, before Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 15, 1965.)

In the same vein Chairman Dixon has recently stated:

> "The man who is willing to comply with the law simply can't afford to if his competitor is allowed to go on violating it."
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> (*Voluntary Law Enforcement: An Approach to 'Administrative' Delay,* an address by Paul Rand Dixon, Chairman of the FTC, Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D. C., March 17, 1965.)

See also a recent address of Commissioner Everett McIntyre on *Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act,* before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965.

All the Commissioners appear to agree with petitioner herein and with the dissenting opinions filed except that they do not apply their publicly expressed views to cases which come before them.

It must appear indeed strange to this Court that in the light of the expressed views of the Commissioners themselves and the statements made by dissenting Commissioner, that the problem of singling out companies, particularly in Robinson-Patman cases, and the inability of the Commission to deal with the industry generally in an industry-wide situation has reached a stage of serious proportions. In the Commission's brief in support of its petition for a writ of certiorari, filed in the October Term, 1965, in the Supreme Court of the United States, in the matter of *Federal Trade Commission* v. *Universal-Rundle Corporation,* No. 1222) on page 17a there is annexed Appendix C by the Commission in which it points out that since 1964, it has refused to stay 12 orders in various industries which have all claimed that they were being sorely prejudiced by the failure of the Commission to obtain compliance orders against their competitors. This points out how serious this problem has become in the light of the present application and other current cases, that remedy must be found to deal with this matter.

This Court should review this entire record and determine whether or not the court of appeals is properly interpreting the prior rulings of the court laid down in *Moog Industries,* supra, and *Universal-Rundle,* supra. The problem has become so serious that the growing demand for relief which currently exists in many industries must com-

pel this Court to review this situation and determine whether or not it can change the present practice of the Commission which appeared to create several classes of competitors —those who are covered by restraining orders and those who are not. It might very well indicate that the present statute is inadequately drawn so as to preclude such relief. If this is true, the statute must be struck down or other relief granted on the ground that it fails to provide "equal justice under law" for competitors in the women's coat and suit industry.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1968.